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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

JURISDICTIONAL STATEMENT

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STATE OF CALIFORNIA, acting by and
through the Department of Public Works,
Appellees.

JURISDICTIONAL STATEMENT

Appellants submit this Jurisdiction Statement to show that the Supreme Court of the United States has jurisdiction of appeal herein, and that a substantial question is presented.

(A) OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is reported in 266 Cal. App. 2d ___, 266 A. C. A. 652, 72 Cal. Rptr. 240. The Supreme Court of California denied Appellants' Petition for Hearing without opinion.

(B) JURISDICTION

(i) This is an inverse condemnation action, seeking compensation for damages, including physical damage, to Appellants' homes and for deprivation of the use and enjoyment of their property. Such action may be brought in California directly under the authority of Art. 1, §14, and Art. 20, §6, of the State Constitution, and requires no statutory authorization. Rose v. State of California (1942) 19 Cal. 2d 713, 123 P. 2d 505.

(ii) The judgment sought to be reviewed is that of the California Court of Appeal. Said judgment was filed and entered on October 17, 1968. A timely Petition for Rehearing was duly filed on November 1, 1968, and was denied by the Court of Appeal on November 13, 1968. A timely Petition for Hearing was duly filed in the Supreme Court of California on November 22, 1968, and was denied on December 11, 1968. A Notice of Appeal to the Supreme Court of the United States was filed in the California Court of Appeal, Second Appellate District, on January 15, 1969.

(iii) This appeal is brought pursuant to the provisions of 28 U.S.C. §1257(2).

(iv) Cases believed to sustain the jurisdiction of the United States Supreme Court are: Baltimore & P.R. Co. v. Fifth Baptist Church (1883) 108 U.S. 317; Richards v. Washington Terminal Co. (1913) 233 U.S. 546; Portsmouth Harbor etc. Co. v. United States (1922) 260 U.S. 327; United States v. Causby (1946) 328 U.S. 256; Griggs v. County of Allegheny (1962) 369 U.S. 84.

(v) The statute involved herein is §3482 of the California Civil Code (West's Annotated Calif. Codes, Vol. 12, p. 623), which provides:

> "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

(C) QUESTIONS PRESENTED

1. Is §3482 of the California Civil Code constitutional:

   (a) On its face, to the extent it purports to grant to the legislature a carte blanche to "confer immunity for a private nuisance of such character as to amount in effect to a taking of

private property for public use? 1/

(b) As applied herein, to the extent it purports to deny just compensation to owners of homes which by the construction and operation of an adjacent freeway have been subjected to noxious fumes, loud noise, dust-laden air, shocks and vibrations, imminent hazards from foreseeable accidents on an adjoining above-grade freeway, causing loss of sleep, eye irritation, difficulty in hearing, and causing physical damage to the homes and their contents, and thereby depriving the owners of the use and enjoyment of their property, and reducing the market value thereof.

(D) STATEMENT OF THE CASE

Appellants (hereafter Homeowners) are nine couples who are owners of single family homes in Santa Fe Springs, a modest suburban area of Los Angeles (CT 90-92). 2/ Appellees are the

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1/ The quoted language is from Richards v. Washington Terminal Co., supra, 233 U.S. at 553.

2/ The abbreviation CT refers to Clerk's Transcript, the record upon which the instant case was appealed to the California courts. (Continued)

State of California acting through its Department of Public Works (hereafter State) and Peter Kiewit Sons' Co. (hereafter Kiewit), the State's contractor (CT 89).

Stated concisely, the instant action is one in inverse condemnation, whereby Homeowners seek to recover compensation for damages inflicted on their property by the State's and Kiewit's construction and operation of a freeway in proximity to Appellants' homes.

1. Procedural Posture of the Case

It should be noted preliminarily that the appeal in the state courts was from a judgment of dismissal following the sustaining of a demurrer without leave to amend to Homeowners' Third Amended Complaint (CT 124). Procedurally, this has two consequences on appeal in the state courts: (a) The facts alleged in the Homeowners' Third Amended Complaint are presumed true, and (b) only the Third Amended Complaint is reviewed on appeal in the state courts.

For purposes of compliance with Rule 16(b) it should be noted that Homeowners duly raised

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2/ (continued) Numbers following the letters CT designate pages of the Clerk's Transcript. The entire Clerk's Transcript is included in the record on appeal to the United States Supreme Court.

the federal question (i. e. the taking of property without compensation) in Homeowners' original pleading (CT 5) as well as in their superseded First Amended Complaint (CT 29-30) and Second Amended Complaint (CT 61). The same is true of the Third Amended Complaint (CT 94). Inasmuch as in California pleadings must contain factual averments, and legal conclusions are impermissible, Homeowners timely raised and throughout argued the federal questions, including specifically the unconstitutionality of California Civil Code §3482, by memoranda of law filed in connection with the Superior Court's consideration of the various demurrers (See CT 135, 136-139, 175, 205 (lines 12-16), 245, 246-248, 250-251).

The federal question was duly raised before the California Court of Appeal by the respective briefs and arguments. Under California practice there are no formal assignments of error; asserted errors are discussed in briefs and arguments. In the Court of Appeal Homeowners expressly continued to argue the unconstitutionality of Civil Code §3482, particularly as applied to them, as repugnant to the due process and just compensation clauses of the United States Constitution.

The California Court of Appeal in its opinion expressly acknowledges Homeowners' reliance on the Fifth and Fourteenth Amendments of the United States Constitution (p. A-2, infra), and Homeowners' reliance on "a number of cases of the United States Supreme Court" (p. A-4, infra).

2. Statement of Facts

The substantive facts of the case at bench are as simple as they are devastating to the Homeowners.

The Third Amended Complaint is found at CT 89-95. In substance (and insofar as material to this appeal) it alleges that the State and Kiewit, by means of construction and operation of the San Gabriel River Freeway in the vicinity of Homeowners' dwellings, subjected Homeowners and their homes to noxious fumes, loud noise, dust-laden air, *shocks and vibrations*, and imminent hazards from foreseeable accidents on the freeway (CT 92-93).

These conditions caused the Homeowners' dwellings and contents thereof to sustain physical damage, and subjected Homeowners to loss of sleep, eye irritation, difficulty in breathing and hearing (CT 93).

By reason of these facts Homeowners were rendered unable to fully use their land due to noise and dirt from the freeway and fear of cars and debris coming down the freeway embankment (CT 94).

Moreover, by reason of the above circumstances, the market value of Homeowners' property has been reduced and impaired (CT 94).

Homeowners received no compensation for any of the damages thus suffered.

(E) THE FEDERAL QUESTION RAISED IS SUBSTANTIAL

1. The Conditions Giving Rise to This Appeal Are Nationwide in Scope

Few issues of the recent years have caused as much turmoil across the country as the impact of freeways on densely populated areas. Fueled by billions of federal-aid dollars, the highway builders have been slashing across towns and suburbs, with callous disregard for those in the path of the, by now proverbial, concrete juggernaut.

The foregoing words may, at first blush, smack of an advocate's rhetoric. They are, if anything, inadequate to describe either the intensity or the extent of the problem. By way of example see: "Trouble Ahead for Freeways in Cities", U.S. News & World Report, April 4, 1966, p. 8; "Fighting the Freeway", Newsweek, March 25, 1968, pp. 65-65; "Hardnosed Highway men Ride Again", Life, April 14, 1967, p. 4 (editorial); "A Rising Furor Over Superhighways U.S. News & World Report, November 27, 1967, p. 15; "Reconciling the Conflict of Highways and Cities", The Reporter, Feb. 8, 1968; "U.S. Road Plans Periled by Rising Urban Hostility", New York Times, Nov. 13, 1967, p. 1; "Interstate 87", Atlantic Monthly, Sep. 1967, pp. 104-9; Skow, "The 'Highwaymen Come to Morristown", Saturday Evening Post, April 9, 1966,

p. 68; Whalen, "The American Highway: Do We Know Where We're Going", Saturday Evening Post, Dec. 14, 1968, p. 22.

Particularly see Reich, "The Law of the Planned Society", 75 Yale L. J. 1227-29 (1966), which graphically describes repeated instances of physical violence between otherwise respectable citizens and the authorities over community spoilation threatened by freeways.

Nor has criticism been emanating solely from the victims and impartial observers. The arrogant disregard of the highway builders for the communities they bulldoze has evoked critical words from more responsible members of their own ranks. In addressing the Town Hall in Los Angeles on October 10, 1968, then Secretary of Transportation, Alan S. Boyd, forthrightly acknowledged the problem:

> "We are learning that highways have a critical impact upon the total environment; unless they are carefully planned they can ruin neighborhoods, add to pollution, displace thousands of poor people, absorb valuable park land, and promote congestion instead of relieving it." 30 Town Hall Journal (Los Angeles) Oct. 29, 1968, p. 288.

Others who have studied the problem have likewise delivered a scathing judgment:

> "Freeways have done terrible things to cities in the past decade, and in

many instances have almost irrevocably destroyed large sections of the cities which they were meant to serve. On the social level, they not only have often devastated, more completely than any bombing, vast acreages of houses which provided needed low cost housing for families who could not afford higher rents, but they have also wrecked neighborhoods whose old buildings had great character and charm.

* * * The freeway in the city has been a great destroyer of neighborhood values."

Halprin, "Freeways" (1966, Rheinhold Pub. Corp.)

The foregoing expressions are but a sample of a large body of concerned public and informed opinion which recognizes the stark reality that freeways, in addition to serving[3/], can and often do devastate. And the victims of that devastation are people innocent of any wrong-doing, who by chance find themselves in the path of a line, more or less arbitrarily drawn on a map by a faceless engineer whose acts are not subject to review.

3/ Some of the more astute observers have noted that those served above all by freeways are the trucking and concrete industries. See Bronson, "How to Kill a Golden State", pp. 104-105, (1968); Otten, "Concrete Catastrophes", The Wall Street Journal, Feb. 25, 1969, p. 14

2. The Conditions to Which Homes Adjacent to Freeways Are Subjected, are a Nuisance of Such Proportions as to Amount to a Constitutional Taking of Property

The case at bench brings before the Court what - in terms of individual injustice - is probably the most unfair aspect of the problems thus generated: the plight of the owner of a modest home which by chance winds up next to a freeway, but is not taken. To such an owner the reality is that what used to be a place of repose for the family, is transformed into a bedlam of noise, surrounded by a polluted atmosphere of smoke, dust and automobile exhaust fumes. 4/ The backyards become incapable of normal use, not only because of the polluted environment, but also because of

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4/ Recent studies indicate that in areas bordering on urban freeways, atmospheric carbon monoxide contamination reaches levels sufficiently high to produce noticeable biological effects, including impairment of judgment. Getze, "Freeway Fumes May Reduce Driver Ability, Official Says", Los Angeles Times, Feb. 11, 1968, p. 3

constant danger of debris coming down the freeway embankment. 5/ In time the homes exhibit physical damage from the constant vibrations, and the paint and contents of the homes become damaged by the fumes and dust. Necessarily, the value of the homes decreases, striking those least able to afford it a devastating financial blow.

In a nutshell, it is Appellants' contention that these things - upon sound legal principle - constitute an interference with property, of such dimensions as to constitute a "taking" within the meaning of the Fifth Amendment, and require the payment of just compensation. Therefore, legislation - such as the statute attacked by this appeal - which purports to abrogate this right to just compensation is necessarily repugnant to the Constitution. This conclusion is based directly upon the reasoning of this Court in Richards v. Washington Terminal Co. (1913) 233 U.S. 546, 552.

> "But the legislation we are dealing with must be construed in the light of

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5/ Freeways are prodigious debris producers. Highway officials estimate that freeway debris in the Los Angeles area runs into the hundreds of tons per year. "Motorists Lose Bit of Everything on Freeways", Los Angeles Times, Nov. 17, 1968, Part V, p. 5. Additionally, accidents cause cars to hurtle down freeway embankments, and accident-caused gasoline spillage and fires are not uncommon.

the provision of the 5th Amendment - 'nor shall private property be taken for public use without just compensation' - and is not to be given an effect inconsistent with its letter or spirit. The doctrine of the English cases has been generally accepted by the courts of this country, sometimes with scant regard for distinctions growing out of the constitutional restrictions upon legislative action under our system. Thus, it has been said that 'a railroad authorized by law and lawfully operated cannot be deemed as a private nuisance'; that 'what the legislature has authorized to be done cannot be deemed unlawful', etc. These and similar expressions have at times been indiscriminately employed with respect to public and private nuisances. We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such character as to amount in effect to a taking of private property for public use."

Richards was but an expression of a settled principle. In Baltimore & P. R. Co. v. Fifth Baptist Church (1883) 108 U. S. 317, 332, the Court held:

"The acts that a Legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." (Emphasis added)

Since then, this Court has held repeatedly that acts amounting to a substantial interference with the use and enjoyment of one's property, can amount to a constitutional "taking" although the owner is not physically dispossessed nor divested of title. Portsmouth Harbor etc. Co. v. U.S. (1922) 260 U.S. 327; U.S. v. Causby (1946) 328 U.S. 256; Griggs v. County of Allegheny (1962) 369 U.S. 84. And such "taking" can be accomplished as well by subjecting the aggrieved owner's land to smoke and fumes (Richards v. Washington Terminal Co., supra, 233 U.S. at 556-557), as well as by noise (Causby, Griggs). In other words, the "taking" may be accomplished by the kind of interference traditionally known in the law of property as nuisance. 6/ Physical

6/ Because of the imprecision with which the word "nuisance" is often employed (see, Prosser on Torts (3rd Ed.), pp. 592-593), it must be made clear that the word "nuisance" (continued)

"taking" is thus unnecessary to invoke the just compensation clause of the Fifth Amendment. This is the settled view. See Nichols on Eminent Domain (3rd Ed.), Vol. 2, §6.3, "Non-physical Takings", p. 407; Lewis on Eminent Domain Vol. 1, (3rd Ed.), §65, pp. 56-58. For a more comprehensive discussion of this point see Stoebuck, "Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect", 71 Dickinson L. R. 207, 217-222, (1967). This is consistent with the doctrine that "property" is not a thing but a group of rights. U. S. v. General Motors (1945) 323 U. S. 373, 377-378. Also see, Stoebuck, op. cit., 71 Dickinson L. R. at 209-217.

The right to be free of nuisance impairing an individual's rights of property, is within protection of the Constitution and thereby impervious to legislative enactments purporting to confer immunity upon the perpetrator of the nuisance. Baltimore & P. R. Co. v. Fifth Baptist Church, supra, 108 U. S. at 331-332; and Richards v. Washington Terminal Co., supra, 233 U. S. at 552-53.

6/ (Continued) as used by Appellants refers to interference with property, as defined in Restatement of Torts §822. Also see, Prosser, "Private Action for Public Nuisance", 52 Va. L. R. 997-998 (1966).

3. The Distribution-of-Cost Theory Implicit in the Just Compensation Clause and Sound Policy Compel the Conclusion that Homeowners Should Not be Forced to Involuntarily Subsidize Highway Construction

To the above discussion of legal principle there must be added a few thoughts as to policy. These go directly to the importance of the issues presented to the Court.

It thus being established that nuisance (i. e., interference with the use of property), can amount to a constitutional "taking", it follows necessarily that to adjudicate the rights of the litigants in such a case, a court must hear evidence going to the intensity and extent of the interference. Unless this is done a court cannot tell whether a "taking" has occurred. 7/ But in the case at bench Appellants' action was dismissed on a demurrer without any inquiry into the merits.

It is submitted that the invocation of California Civil Code §3482 to accomplish such result, amounts to a declaration of legislative

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7/ For an example of judicial pragmatism on this point see U. S. v. Certain Properties, etc. (1966, W. D. Mich.) 252 F. Supp. 319.

power to repeal - at least pro tanto - the just compensation clause of the Fifth Amendment. It follows that California Civil Code §3482 is repugnant to the Constitution on its face and certainly as applied to Appellants.

It is settled rationale of the concept of just compensation in eminent domain, that an individual whose property is adversely affected by a governmental course of conduct in the creation of public projects, should not be forced "... to bear public burdens which, in all fairness and justice should be borne by the public as a whole." Armstrong v. U.S. (1960) 364 U.S. 40, 49. Also see Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law", 80 Harvard L.R. 1165, 1181 (1967).

The case at bench is a conspicuous example of the antithesis of the above principle. Here, a group of families of modest means is being forced to shoulder a disproportionate share of the economic burden of highway construction. In plain English, these families are being forced to subsidize the highway users, particularly the trucking industry. 8/

8/ Studies performed under the auspices of the Automobile Manufacturers Association indicate that trucks reap a windfall on Los Angeles freeways, saving almost 10¢ per mile (9.93¢ to be exact). Wilbur Smith & Associates, "Future Highways and Urban Growth", p. 292, (1961).

In the past this Court perceptively noted the changing realities of transportation technology. In Nashville, C. & St. L. R. Co. v. Walters (1935) 294 U.S. 405, the impact of the emerging highway network on railroads was analyzed, and the Court balanced their competing needs and burdens. It is submitted that the relentless slashing of freeways through densely populated areas has brought about a situation where the distribution of burdens between the freeway builders and those in the freeways' path likewise needs a fresh judicial look.

In Nashville C. & St.L. R. Co. v. Walters, supra, the Court held that the Tennessee legislature could not force an unfair share of grade-crossing costs upon the shoulders of railroads, and to the unfair advantage of the highway system. Likewise, in the case at bench it should be recognized that it is even more unfair to force a disproportionate economic burden of freeway construction upon those who derive no direct benefit therefrom, and who are least able to bear the resulting economic burden. Today's conditions have changed: the burgeoning highway-building program is no delicate flower in need of judicial protection. That protection is needed for those who must live in the aftermath created by the freeway builders' bulldozers.

In California such disproportionate economic burdening of the freeways' neighbors is particularly unjust, because California highways are to be paid for solely by their users. Article 26 of the California Constitution requires that

fuel tax and license fee revenues be devoted solely to highway purposes. Those revenues (and federal aid funds) are the sole source of highway funds in California. "California State Highway System Financing", Publication of the State Division of Highways, 1968.

Thus, any shift of highway building costs from the highway users onto others[9/], constitutes not only a violation of the distribution-of-cost principle of Armstrong, supra, 364 U.S. at 49, but also outright invidious discrimination in favor of highway users at the expense of others. We respectfully ask the Court to bear in mind that most of the highways in question are built with federal funds. See Title 23 U.S.C. §§101-136. It is adding insult to injury, for a state to use such funds in so plainly discriminatory a fashion, to say nothing of the denial-of-equal-protection aspects thereof.

Appellants recognize, as they must, that some of the ramifications of the broader problems involved here go beyond the scope of a judicial proceeding. None of this, however, must obscure the fundamental principle that when society builds public works, society as a whole should bear the economic burden which goes with the benefit. This is what "just

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9/ It is, of course, basic economics that the cost of highways is the same regardless of whether compensation is paid. Payment or non-payment of just compensation merely shifts the incidence of that cost.

compensation" is ultimately all about. And "just compensation" is the exclusive province of the Courts; it cannot be curtailed by legislatures. 10/

Mr. Justice Holmes probably put it best when he said:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."
>
> Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393, 416.

In short, it is bad policy for the many to abuse the few.

10/ Monongahela Nav. Co. v. U.S. (1892) 148 U.S. 312, 327; Seaboard Airline R. Co. v. U.S. (1923) 261 U.S. 299, 304; U.S. v. New River Collieries (1923) 262 U.S. 341, 343; B & O. Ry. Co. v. U.S. (1936) 298 U.S. 364, 365.

CONCLUSION

Putting aside the foregoing arguments of law and policy, Appellants submit that they have been unfairly and unjustly dealt with. The court whose opinion is sought to be reviewed here, expressly acknowledged this lamentable fact. It characterized the conditions imposed upon Appellants as "obnoxious", yet held that "they must be endured without redress", without so much as a word of reason or rationale.

In a society in which people in alarming numbers are turning away from rational judicial tools of conflict-resolution, such a judicial attitude toward palpable injustice will not do. The task of defining and applying the rules of just compensation belongs to the courts; it cannot be taken away by an over-broad legislative act.

The questions presented are substantial and timely.

Appellants respectfully pray that probable jurisdiction be noted by the Court.

Respectfully submitted,

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GIDEON KANNER

Attorneys for Appellants

[Civ. No. 31774. Second Dist., Div. Three. Oct. 17, 1968.]

FRANK A. LOMBARDY et al., Plaintiffs and Appellants, v. PETER KIEWIT SONS' CO. et al., Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard L. Wells, Judge. Affirmed.

Action for damages allegedly sustained as a result of the construction and operation of a freeway. Judgment of dismissal after demurrers to third amended complaint were sustained without leave to amend affirmed.

Fadem & Kanner and Gideon Kanner for Plaintiffs and Appellants.

Veatch, Carlson, Dorsey & Quimby, Robert P. Dorsey, Henry F. Walker, Harry S. Fenton, R. B. Pegram, Joseph A. Montoya, Richard L. Franck, Charles E. Spencer, Jr., and Jack M. Miller for Defendants and Respondents.

SHINN, J.*—The action is for damages claimed to have been sustained as a result of the construction and operation of the San Gabriel River Freeway in Los Angeles County. Plaintiffs are the owners of property adjacent to the freeway; defendants are the State of California and Peter Kiewit Sons' Co., a corporation. Plaintiffs are husbands and their wives who own, separately, 4 lots in Tract 16943; 4 lots in Tract 16944 and one lot in Tract 16914. The state, by and through the Department of Public Works, installed the freeway; Peter Kiewit Sons' Company was the contractor under contract with the state.

The complaint (third amended) purports to state a cause of action for physical damage to the real property of plaintiffs, for damage to their rights under tract restrictions and for detriment caused them upon the theory that the freeway constitutes a nuisance.

The demurrers of the defendants to the third amended complaint were sustained without leave to amend, judgment was

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

entered in favor of the defendants and plaintiffs appeal. We have concluded that the complaint fails to state a cause of action upon any theory and that the judgment should be affirmed.

With respect to the alleged damage to the real property of plaintiffs the action is in inverse condemnation and compensation is claimed under Article 1, section 14 of the California Constitution, the Fifth and Fourteenth Amendments of the United States Constitution and state legislation.

The requisites of a complaint in inverse condemnation are stated in [1]Chadbourn, Grossman and Van Alstyne, California Pleading, section 896, pp. 850-851, as follows:

The complaint reads in part as follows:

"6

"In the process of construction and operation of the above described freeway and as a proximate, direct and necessary result of the plan, design, execution, construction, maintenance and operation thereof, Defendants used or caused to be used various machinery, equipment, labor and materials, in a manner which the Plaintiffs do not know to have been or not been required by the plans and specifications and the precise nature of which is not known to Plaintiffs but all of which is known to Defendants. Thereby Plaintiffs and their property have been subjected to noxious fumes, loud noise, dust-laden air, shocks and vibrations, imminent hazards from foreseeable accidents and collisions on the freeway, and mental, physical and emotional distress, resulting therefrom. The above-described acts and conditions have caused loss of sleep, eye irritation, difficulty in breathing, difficulty in hearing conversations and broadcasts, and have been an unceasing source of worry, disturbance and irritation. . . .

[1]"A mere general allegation that in the course of constructing a public improvement the defendant damaged or took the plaintiff's land is insufficient to state a cause of action in inverse condemnation. A considerable volume of litigation has documented the fact that the line between compensable takings and damagings and those which are regarded as *damnum absque injuria* is indeed a fine one marked by narrow and in some cases apparently arbitrary factual distinctions. In order to clarify the issues, and to eliminate so far as possible those claims which are founded on noncompensable takings or damagings, it is thus desirable and consistent with efficient judicial administration to plead the facts showing what the defendant did and how the injury occurred in specific detailed allegations. In view of the fine distinctions drawn in the substantive law of inverse condemnation, the pleader's primary concern should be directed toward stating the facts in a manner which will correspond to some recognized theory of compensable damages."

"13"

"That as a proximate result of said acts by the Defendants and each of them, Plaintiffs have sustained and incurred and are certain in the future to sustain and incur, losses, injuries and damages to real property and person in excess of $5,000.00 per Plaintiff, the exact amount of which presently cannot be ascertained. Plaintiffs request leave of court to amend this Complaint to insert the amount thereof when the same has been ascertained."

[1] There was no allegation that the land of plaintiffs had sunk or shifted, the foundations of the houses had sunk, that walls had been cracked, windows broken or that the buildings had sustained any other type of injury or damage.

The allegation that the described acts of defendants have caused "damages to real property and person in excess of $5,000.00 per Plaintiff" was not an allegation that the real property of plaintiffs has sustained damage in any substantial amount.

No recovery in inverse condemnation may be had unless damage in a substantial amount to the property itself has been sustained. (*Albers* v. *County of Los Angeles*, 62 Cal.2d 250 [42 Cal.Rptr. 89, 398 P.2d 129]; *Frustuck* v. *City of Fairfax*, 212 Cal.App.2d 345, 364 [28 Cal.Rptr. 357].)

[2] The mental, physical and emotional distress allegedly suffered by plaintiffs by reason of the fumes, noise, dust, shocks and vibrations incident to the construction and operation of the freeway does not constitute the deprivation of or damage to the property or property rights of plaintiffs for which they are entitled to be compensated. In *People* ex rel. *Department of Public Works* v. *Symons*, 54 Cal.2d 855, 860-862 [9 Cal.Rptr. 363, 357 P.2d 451], it was said: "It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, change of view, diminished access and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property. (*Bacich* v. *Board of Control*, 23 Cal.2d 343 [144 P.2d 818]; *Rose* v. *State, supra*, 19 Cal.2d 713 [123 P.2d 505]; *Eachus* v. *Los Angeles etc. Ry. Co., supra*, 103 Cal. 614, 617 [37 P. 750, 42 Am.St.Rep. 149]; *Reardon* v. *San Francisco*, 66 Cal. 492, 506 [6 P. 317, 56 Am.Rep. 109].)" Later cases are in accord. (*Albers* v. *County of Los Angeles, supra*, 62 Cal.2d 250; *Breidert*

v. *Southern Pac. Co.*, 61 Cal.2d 659 [39 Cal.Rptr. 903, 394 P.2d 719]; *Katcher* v. *Home Sav. & Loan Assn.*, 245 Cal.App. 2d 425 [53 Cal.Rptr. 923].)

[3a] It was alleged in the complaint that the construction and operation of the freeway created an eyesore and "It also interferes with and obstructs the view of and from Plaintiffs' homes and is an unsightly change in the character of the Plaintiffs' neighborhood in violation of deed restrictions of Tracts No. 16194, 16943, and 16944, which restrictions limit the uses within the Tracts to single family residential and non-offensive activities." It was alleged that plaintiffs have been deprived of their property rights in the tract restrictions and have not been paid compensation for loss of the same.

Appellants are contending for an extravagant extension of the rights created by the customary restrictions upon the use of property in residential subdivisions. If such restrictions constituted property rights free from any type of interference, every owner of a lot in a restricted tract would have to be a party to a grant of a right of way, or an action to condemn the same, over any portion of the tract. No such roadblock to the development of local and state transportation systems exists.

Under the heading "Governmental interference with property owners rights under deed restrictions is a compensable taking and damaging of property" appellants say, "Poised in the path of appellants' argument on the point suggested by the above headline, is the 37-year-old decision in *Friesen* v. *Glendale* (1930) 209 Cal. 524 [288 P. 1080], holding that deed restrictions are not compensable because they are not property but rights of a contractual nature. Nevertheless, appellants respectfully submit that this court should reach a contrary result for the following reasons. . . ." Appellants then cite a number of cases of the United States Supreme Court, contending that they abrogate the rule declared in *Friesen*.

The opinion in *Friesen* discusses the nature of building restrictions as negative easements or equitable servitudes as it has long been recognized and defined in California law.

In *Friesen* it was sought to enjoin the installation of a street through a subdivision upon the ground that the same would violate rights of the lot owners under restrictions "That said premises shall be used for residence purposes only." The basis of the court's holding was expressed in the

following statements (pp. 529-530): "[5] It is also well established that the 'provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land.' (*Werder* v. *Graham*, 181 Cal. 174 [183 P. 945]; 7 Cal.Jur., p. 733.) This rule would seem to be especially applicable where the title to the land is acquired by a municipality for public street purposes. To construe the instrument strictly in favor of the servitude would impose upon the city the obligation to use the land acquired for residential purposes only, a use to which the city obviously has no power to devote land acquired for street purposes. A construction strictly against the covenant would permit the city to acquire the land freed from the restriction. [6] Furthermore, a duly enacted law providing for such a restriction, binding upon private parties, is not binding upon the sovereign unless it appear expressly or by necessary implication that the sovereign consented to be so bound. (*C. J. Kubach Co.* v. *McGuire*, 199 Cal. 215 [248 P. 676].) Much less would the city be bound by the terms of a private contract to which it was in nowise a party." And, further, ". . . parties may not by mutual covenants in private contracts create for themselves an estate in land not known to our law and thus entitle them to compensation where no such right existed before."

[4] It is the law in California that building and use restrictions of a residential tract do not constitute an interest in land vested in the lot owners which is damaged by the construction of a state freeway through the tract.

[3b] The complaint fails to state a cause of action in inverse condemnation.

[5a] Next to be considered is the contention that the defendants have created a nuisance. The facts relied upon are those stated in the paragraphs of the complaint set out above. We must accept as true the allegation that the plaintiffs have suffered mental, physical and emotional distress, irritation and worry as a result of the construction and operation of this freeway. All householders who live in the vicinity of crowded freeways, highways and city streets suffer in like manner and in varying degrees. The roar of automobiles and trucks, the shock of hearing screeching brakes and collisions, and the smoke and fumes which are in proportion to the density of the motor vehicle traffic all contribute to the loss of peace and quiet which our forefathers enjoyed before the invention of the gas engine.

[6] The described conditions occurring on state constructed highways do not constitute a nuisance in a legal sense. State highways are constructed and maintained under the authority of article IV, section 36, of the state Constitution, Government Code, sections 14000, 14001, and Streets and Highways Code, sections 90 et seq. Civil Code section 3482 states "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." In *Larson* v. *Santa Clara Valley Water Conservation Dist.*, 218 Cal.App.2d 515, 526 [32 Cal.Rptr. 875, 8 A.L.R.3d 665], it was held in reliance upon section 3482 that the construction and operation of a dam under legislative authority did not constitute a nuisance. (See *Zeppi* v. *State of California*, 174 Cal.App.2d 484 [345 P.2d 33]; *Vater* v. *County of Glenn*, 49 Cal.2d 815, 820 [323 P.2d 85]; *Liebman* v. *Richmond*, 103 Cal.App. 354, 357 [284 P. 731].)

[5b] The conditions in which appellants complain are obnoxious to all persons who live in close proximity to the state's freeways but they must be endured without redress.

In view of our conclusion that plaintiffs have no cause of action for nuisance when the construction was state authorized, it is unnecessary to discuss the state's argument that plaintiffs have failed to claim detriment special to themselves. It is also unnecessary to discuss the contention that the complaint fails to allege sufficiently that plaintiffs filed a claim against the state under Government Code sections 905.2, 911.2, 945.4 and 945.6.

The complaint purported to allege negligence on the part of Peter Kiewit Sons' Co. in the construction of the freeway. This claim is not pressed on the appeal; it is therefore unnecessary to consider additional arguments of this defendant in support of the judgment in its favor.

The judgment is affirmed.

Ford, P. J., and Moss, J., concurred.

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